

MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL  
MADISON, WISCONSIN  
October 20, 2006

The Judicial Council met at 9:00 a.m., Room 328 NW, State Capitol, Madison, Wisconsin.

MEMBERS PRESENT: Marla J. Stephens, Chair; Beth E. Hanan, Vice-chair; Justice Ann Walsh Bradley, Michael R. Christopher, Susan L. Collins, Kathleen E. Grant, Professor Jay Grenig, Honorable Edward E. Leineweber, Robert L. McCracken, Bruce Munson, Professor David E. Schultz, Honorable Mary K. Wagner, Greg M. Weber, Honorable Ted E. Wedemeyer, Jr.

MEMBERS EXCUSED: Allan M. Foeckler, Representative Mark Gundrum, Kenneth Kratz, Honorable James Mason, A. John Voelker, Senator Dave Zien

OTHERS PRESENT: Robert D. Donohoo, Marilyn C. Parks, Honorable Earl Schmidt, Cecile Steil, Steven Tinker, Michael Tobin

**I. Call to Order and Roll Call**

Chair Stephens called the meeting to order at 9:00 a.m. She welcomed all present and introduced the guests. Chair Stephens reported that she received a letter from Kenneth Kratz notifying the Council of his resignation due to his caseload and other commitments. Kratz also notified the Governor's office and the Wisconsin Association of District Attorneys of his resignation. Chair Stephens said that Mr. Kratz greatly contributed to the work of the Council, and would be missed.

**II. Approval of Minutes of June 16, 2006 meeting.**

The minutes of the June 16, 2006 meeting were not previously approved and there were no minutes from the September 15, 2006 meeting because there was no quorum.

MOTION: Greg Weber moved, seconded by Judge Wagner, to approve the minutes of the June 16, 2006 meeting.

Motion passed unanimously.

**III. Criminal Procedure Code Revision – Process Review**

Chair Stephens asked Professor Schultz to lead the discussion of this agenda item.

Professor Schultz raised two questions: 1) Shall the Council complete the entire Criminal Procedure Code revision or just select and proceed with portions of the revision, and 2) How shall we go about this work?

Chair Stephens referred the Council to her October 6, 2006 memo summarizing the Council's September 15, 2006 discussion of the Criminal Procedure Code revision that was included in the mailing for the October 20, 2006 meeting and asked if there was any further discussion regarding its contents.

MOTION: Judge Leineweber moved, seconded by Beth Hanan, to proceed with the entire revision to the Criminal Procedure Code as a project for the full Council aided by the Criminal Procedure Committee.

Motion passed unanimously.

Chair Stephens asked Professor Schultz to continue leading the discussion. He noted that the Committee had completed revisions of all chapters of the Code except for Chapter 975. He then outlined the information that had been sent to the full Council in preparation for the October 20, 2006 meeting discussion: his October 10, 2006 and September 7, 2006 memos to the Council, the Council's 1999 draft of proposed ch. 975, the LRB (Legislative Reference Bureau) revisions to proposed ch. 975 (LRB-0377/P2), the October 2005 Criminal Procedure Committee meeting summary, the current statutes (§§ 971.13 - 971.18) and two cross reference guides. He noted that the Criminal Procedure Committee had reviewed the LRB draft through proposed § 975.06 and suggested that the Council's review begin with proposed § 975.07 and proceed to the end of the chapter.

The Council would then forward the Council's comments on the LRB draft to LRB. LRB would then prepare a draft bill of the entire code revision for introduction. Concurrently, the Council members would build support for the revision in the legislature, the bar and in the justice system. Finally, the Council would review the draft bill to ensure that all changes were incorporated. Prof. Schultz suggested that the Council might want to designate a sub-group to check the LRB's final bill draft prior to its introduction in the legislature.

Michael Christopher asked if it might be worthwhile and more efficient to have the drafter from LRB here to get the LRB's point of view as the Council works through the Procedure Code Revisions. Discussion followed. Professor Schultz informed the Council that several drafters worked on different chapters of the code revision, hence no drafter was familiar with what was in other chapters of the proposed code. Bob Donohoo brought to the Council's attention that at one point there was a person from LRB present, but the person did not give his opinions on content. Chair Stephens indicated that since this is the last chapter

requiring Council review, the Council would proceed with the Council members present today.

#### **IV. Committee Reports**

##### **A. Appellate Procedure Committee**

Chair Stephens reported that the committee suspended work on revisions to statutory procedures governing the use of pre-sentence investigation reports at sentencing and in appeals, pending a decision by the Supreme Court in *State v. Parent*.

Chair Stephens also distributed copies of a memo requested by Nancy M. Rottier, Legislative Liaison to the Wisconsin Supreme Court, explaining the Council's request for follow-up legislation to the Council's Rule Change Petition No. 00-02. She hopes to work with Ms. Rottier and the State Bar of Wisconsin to pass this legislation, and will advise the Council of any progress.

The Committee has not scheduled its next meeting date.

##### **B. Criminal Procedure Committee**

Chair Stephens deferred the Criminal Procedure Committee report until the Council took up agenda item V. -- Chapter 975 -- Criminal Procedure Revision.

##### **C. Evidence and Civil Procedure Committee**

Beth Hanan reported that the Committee has no assignments at this time.

##### **D. Strategic Plan Committee**

Judge Leineweber reported that he contacted Attorney Joe Ranney to discuss his "Proposal -- Research Current Patterns and Practices Concerning the Initiation and Implementation of Rules of Practice and Procedure in the Wisconsin Courts and to Report Findings to the Wisconsin Judicial Council," submitted in response to the Council's RFP, and to inquire whether Attorney Ranney would consider paring down his proposal to accommodate the Council's budget. He also reported that the Committee will continue to look for additional funding for the study from the State Bar of Wisconsin and the National Center for State Courts, or look to find another way to conduct the research component of the proposal. The Committee is scheduled to meet briefly after today's meeting.

##### **E. Internal Operating Procedure Committee**

Bruce Munson recommended that Council committees not send actual minutes of meetings, but rather retain successive dated drafts of work on Council projects with notes or a summary regarding actions taken. Discussion followed.

Chair Stephens asked whether the Council should submit copies of the drafts to Jim Alexander as they are completed or at the end of the project, and whether electronic copies of the *drafts* should be posted on the Council's web site. Greg Weber asked whether records for the Criminal Procedure Committee could be posted electronically so interested parties could track the drafts and future activity. Professor Schultz said that electronic copies of the Council's drafts are not available. Chair Stephens suggested that the question of submitting electronic copies of drafts/meeting notes be raised again at the November meeting when James Alexander will be present.

#### F. PPAC Liaison Report

Judge Leineweber reported that there will be a workshop on videoconferencing at the November Judicial Conference to get input from judges in light of developing case law. He then referred to Chief Justice Abrahamson's August 30, 2006 letter regarding the PPAC recommendation that the Council explore "the Federal Rule 11 approach and its effects on the system and the potential development of a similar Wisconsin rule," based upon the Supreme Court's PPAC Subcommittee on Court Efficiencies Final Report and Recommendations. Chairperson Stephens and Professor Schultz were members of the subcommittee and stated that the federal Rule 11 procedure allows a criminal defendant to withdraw a guilty plea entered in exchange for a sentencing recommendation if the court will not follow the sentencing recommendation. Also as a result of the subcommittee's recommendation, the court of appeals is tracking appeals in criminal cases over the next two years and will report on the extent that its caseload might be affected by such a rule. Professor Schultz also reported that he surveyed circuit judges concerning their current practices and learned that several judges already allow plea withdrawal under these circumstances. Consequently, there is a test group we can consult in the future. The link to the final Report of the PPAC Court Efficiencies Subcommittee is <http://wicourts.gov/about/committees/docs/ppaccourtefficienciesrpt.pdf>.

#### V. Chapter 975 -- Criminal Procedure Revision

Professor Schultz set the stage for the detailed discussion of the last remaining chapter of the Criminal Code Procedure revision. He reviewed the materials that were sent out in preparation for today's meeting.

Discussion followed. Michael Christopher suggested that, rather than going through the individual LRB recommendations and the individual Council

recommendations, Professor Schultz point out the substantive differences between what the LRB and the Council have recommended for each section of ch. 975.

Judge Leineweber suggested that there be one motion at the end of the review of the entire chapter, and that if anyone has a serious objection along the way regarding what the Committee has recommended, to please make it known sometime during the review process. The Council agreed by consensus to proceed in this manner.

The Council completed review of the LRB and Council drafts of §§ 975.07, 975.08, 975.09, 975.10, and 975.11. The various decisions, suggestions, revisions, restorations and responses that were agreeable to all were duly recorded by Professor Schultz.

Due to the time, the revision ended at LRB's § 975.11.

## **VI. Other Business**

Chair Stephens stated that the November 17 meeting would be held from 9:00am until noon. The main agenda item for the November meeting, and tentatively for the December 15, January 19 and February 16 meetings, will again be the Criminal Procedure Code Revision.

## **VII. Adjournment**

The meeting was adjourned at noon.